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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON BOWDEN, SR.,

Defendant and Appellant.

C060038

(Super.Ct.No.
CM026029)

Accused of hitting a woman and making her suck his penis while he threatened to "kick her ass" if she bit him, defendant Brandon Bowden, Sr., entered a negotiated plea of no contest to one count of forcible oral copulation. (Pen. Code, § 288a, subd. (c)(2); further section references are to the Penal Code.) Other charges against him were dismissed with a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754). The trial court sentenced defendant to six years in state prison and imposed other orders.

On appeal, defendant contends that the order requiring him to pay a \$420 public defender fee must be reversed because the

trial court failed to follow the statutory procedures required before such an order can be imposed. The People correctly concede the error.

DISCUSSION

“‘[P]roceedings to assess attorney’s fees against a criminal defendant involve the taking of property, and therefore require due process of law, including notice and a hearing.’ [Citations.]” (*People v. Phillips* (1994) 25 Cal.App.4th 62, 72; see *People v. Flores* (2003) 30 Cal.4th 1059, 1062-1063.)

Section 987.8, subdivision (b) states “the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost” of legal assistance provided through “the public defender or private counsel appointed by the court.” Upon determining that the defendant does have “the present ability to pay all or a part of the cost” of legal assistance, “the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county” (§ 987.8, subd. (e).)

“‘Ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant’s present financial position. [¶] (B) The defendant’s reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant’s reasonably discernible future financial position. Unless the court finds

unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant." (§ 987.8, subd. (g)(2).)

Thus, the statutory scheme establishes "a presumption . . . that a defendant sentenced to prison does *not* have the ability to reimburse defense costs." (*People v. Flores, supra*, 30 Cal.4th at p. 1068, italics added.)

Generally, a finding of a present ability to pay need not be express; it may be implied through the content and conduct of the hearings. (*People v. Phillips, supra*, 25 Cal.App.4th at p. 71.)

Here, when defense counsel objected to the imposition of a public defender fee because "there's no ability to pay in that regard[,]" the judge responded: "The Court is leery of making that finding, as it might affect the restitution fine that the Court is imposing. So the Court, based on its current, its prior finding that the defendant is able-bodied and able to work while in the prison system, will not make the requested finding."

Under the statute, however, the trial court should have begun its analysis with a presumption that defendant's prison sentence would render him unable to pay the public defender fee. Thereafter, to rebut that statutory presumption, the court was

required to make a finding of an unusual circumstance. A finding that defendant was "able-bodied" is not enough to defeat the statutory presumption. (§ 987.8, subd. (g).)

An order to pay public defender fees cannot be upheld on review unless it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347.)

Not only did the trial court fail to make the requisite finding, the record does not support an implied finding of unusual circumstances. The only evidence of defendant's "present financial position" in the record is that, at the time of this offense, he had just graduated, or was about to graduate, from college and hoped someday to be a school teacher. Nothing in the record indicated he was working at the time of his arrest, had any significant work history, or had any lawful source of income. It is also evident from the record that defendant has a minor child to support.

Because there was no evidence of unusual circumstances to rebut the presumption that defendant lacked the financial ability to pay for the cost of an attorney, the order requiring him to do so cannot stand.

DISPOSITION

The order directing defendant to pay \$420 in attorney fees pursuant to section 987.8 is stricken. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of

judgment accordingly and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

SCOTLAND, P. J.

I concur:

HULL, J.

I concur but write to note that the trial court was not correct in assuming the legal findings for reimbursement of public defender fees were the same as requirements for restitution fines.

ROBIE, J.